



April 19, 2002

Mr. William T. Buida
Supervising Attorney
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2002-2007

Dear Mr. Buida:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161503.

The Texas Department of Human Services (the "department") received a request for twenty seven categories of information regarding the Parkway Place nursing facility ("Parkway Place") during a specified time period.¹ You inform us that the department is willing to release certain information but claim that other requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.² We have also considered comments submitted by Parkway Place. *See* Gov't Code § 552.304 (providing that interested third party may submit comments as to why requested information should or should not be released).

Initially, we note that the department did not supply the requested information within the fifteen-business-day time period prescribed by section 552.301 of the Government Code. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City*

¹ Included in the submitted records is information concerning Buckner Baptist Haven, which you inform us moved and became Parkway Place during the period covered by the request. For simplicity, we will refer to both nursing facilities as Parkway Place.

² We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

of Houston v. Houston Chronicle Publ'g Co., 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling interest to withhold the information. See Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381. Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As the presumption of openness can be overcome by a showing that information is confidential by law, we will consider the department's arguments under section 552.101.

The department has submitted two categories of information, that which it would normally seek to withhold (the "not release" information) and that which it would normally release after making certain redactions (the "normally release" information). You inform us that the "not release" information consists of "reports, records, or working papers used or developed in an investigation" of Parkway Place. Section 552.101 excepts from required public disclosure information that is made confidential "by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 242.127 of the Health and Safety Code provides as follows: "A report, record, or other working paper used or developed in an investigation and the name, address, and phone number of any person making a report under [subchapter E, chapter 242] are confidential and may be disclosed only for purposes consistent with rules adopted by the Texas Board of Human Services or the designated agency." Health & Safety Code § 242.127. In addition, the department has adopted rules that apply to investigations of complaints of abuse, neglect, and exploitation at nursing facilities and related institutions. Section 19.2010 of title 40 of the Texas Administrative Code provides in part that "[a]ll reports, records, and working papers used or developed by the [department] in an investigation are confidential and may be released to the public only as provided below." 40 T.A.C. § 19.2010(a)(1). Section 19.2011, which prescribes procedures for inspection of public records reiterates that such information is confidential and states that it "may be released to the public as provided in §19.2010(a) of this title." *Id.* § 19.2011. None of the release provisions of section 19.2010 apply. Accordingly the "not release" information, which is confidential under section 242.127 of the Health and Safety Code, must be withheld under section 552.101 of the Government Code.

We turn now to the "normally release" information. We begin by noting that the "normally release" information contains medical record information that is subject to the Medical Practices Act ("MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in

Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Some of the "normally release" documents contain information taken from medical records, which is subject to the MPA. We have marked examples of the type of information that may be released only in accordance with the MPA.

We next note that the "normally release" information includes copies of checks. These checks include bank account numbers that are subject to section 552.136 of the Government Code.³ Section 552.136 provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked samples of bank account numbers, which the department must withhold under section 552.136.

Also contained in the "normally release" information are copies of federal Health Care Financing Administration ("HCFA") form 2567. Federal regulations require the department to release completed HCFA 2567 forms containing a statement of deficiencies and plan of correction, provided that (1) no information identifying individual patients, physicians, other

³ The Legislature also enacted two other bills that add a section 552.136 to chapter 552. House Bill 2589 makes certain e-mail addresses confidential. *See* Act of May 22, 2001, 77th Leg., R.S., ch. 545, § 5, 2001 Tex. Sess. Law Serv. 974, 975 (Vernon). Senate Bill 15 makes information maintained by family violence shelter centers confidential. *See* Act of May 3, 2001, 77th Leg., R.S., ch. 143, § 1, 2001 Tex. Sess. Law Serv. 279 (Vernon). Senate Bill 694 also enacted the same language as House Bill 2589 regarding the confidentiality of e-mail addresses, but codified it as section 552.137 of the Government Code. *See* Act of May 14, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Sess. Law Serv. 614 (Vernon).

medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 U.S.C. 1306(e), (f); 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 at 5 (1988); *see also* Health & Safety Code § 142.009(d)(6). Because the signature of the agency representative on the forms along with the representative's comments indicate that the provider has had a reasonable opportunity to review the reports and offer comments, the department must redact information identifying individual patients, physicians, other medical practitioners, or other individuals from the HCFA 2567 forms prior to their release under section 552.101 in conjunction with federal law.

The "normally release" information also contains completed reports of investigations concerning suspected abuse or neglect, in which you have highlighted identifying information that the department seeks to redact. Section 242.126(g) of the Health and Safety Code states that the department must make investigation reports of abuse or neglect public on request but that the names of the following individuals must be withheld:

- (1) any resident, unless the department receives written authorization from a resident or the resident's legal representative requesting the resident's name be left in the report;
- (2) the person making the report of abuse or neglect or other complaint; and
- (3) an individual interviewed in the investigation.

In addition, the department's rules provide that "[c]ompleted written investigation reports are open to the public, provided the report is de-identified. The process of de-identification means removing all names and other personally identifiable data, including any information from witnesses and others furnished to [the department] as part of the investigation." 40 T.A.C. § 19.2010(a)(1). In addition, section 19.2011 provides in pertinent part:

(e) Records maintained by Long-Term Care-Regulatory are open to the public, with the following exceptions:

...

- (3) all names and related personal, medical, or other identifying information about a resident are confidential;
- (4) information about any identifiable person which is defamatory or an invasion of privacy is confidential;
- (5) information identifying complainants or informants is confidential;
- (6) itineraries of surveys and inspections are confidential.

Id. § 19.2011(e)(3)-(6).

In this case, the department investigated complaints of abuse or neglect of a nursing facility resident under the authority of chapter 242 of the Health and Safety Code. We therefore agree that the submitted reports are subject to section 242.126 of the Health and Safety Code. After reviewing the submitted reports, we conclude that most of the personally identifiable information you have highlighted in the reports is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 242.126 of the Health and Safety Code and sections 19.2010 and 19.2011 of title 40 of the Texas Administrative Code. We note however, that you have highlighted titles such as “LVN” and terms indicating family relationships such as “daughter.” Because you will be redacting individuals’ names, we do not find that these additional terms and titles, standing alone, constitute personal or identifying information. Therefore, you must release this information. Finally, we have marked examples of additional information that is confidential under section 242.126(g)(3) of the Health and Safety Code because it identifies persons who were interviewed during these investigations; this information must also be redacted prior to release of these documents in accordance with section 552.101 of the Government Code.

We also note that you have highlighted social security numbers that are not contained in the abuse investigation reports and therefore are not identifying information made confidential by section 242.126(g). A social security number or “related record” may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You have not informed us under what law or laws these social security numbers were obtained or are maintained. Accordingly, we have no basis for concluding that any of the social security numbers in the submitted documents are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number in the submitted documents, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

We now address Parkway Place’s arguments regarding this information. Parkway Place contends that all of the requested information should be withheld under section 552.101 of the Government Code because the department is a “medical peer review committee.” As noted above, section 552.101 of the Government Code excepts from required public disclosure information protected by other statutes. Section 160.007 of the Occupations Code provides that, subject to certain exceptions, the records and proceedings of a “medical peer review committee” are confidential and communications to such a committee are privileged. Occ. Code § 160.007(a).

A "medical peer review committee" is defined by subsection 151.002(a)(8) of the Occupations Code, which provides in relevant part

'Medical peer review committee' or 'professional review body' means a committee of a health care entity, the governing board of a health care entity, or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services or the competence of physicians.

Occ. Code § 151.002(a)(8). In *Humana Hospital Corporation v. Spears-Petersen*, 867 S.W.2d 858 (Tex. App.-San Antonio 1993, no writ), the court held the Joint Commission on the Accreditation of Healthcare Organizations to be a medical committee because it was made up of representatives of various medical organizations and was organized for medical review purposes. 867 S.W.2d at 862.

The department does not fit within a strict statutory definition of "medical peer review committee" as it is not affiliated with a health care entity and does not operate under bylaws approved by a health care agency. Similarly, the department does not qualify under the interpretation announced by the *Humana* court. The department is an administrative agency of the State and operates under statutory mandates. See generally Human Resources Code §§ 21.001-23.016. Rather than being charged with medical review functions, the department exists to administer general welfare functions. *Id.* § 22.001(a). As noted in the department's brief, among the department's many functions are regulating nursing facilities and acting as a survey agency to assure facilities comply with the requirements of federal medical assistance programs. See Health & Safety Code §§ 242.033 (department's licensing authority over nursing facilities), .037 (department's responsibility for enforcing minimum standards at nursing facilities); 42 C.F.R. §§ 431.610 (requirements of state survey agencies), 483.1-.80 (Medicaid eligibility requirements for long term care facilities). Because we find that the department is not a "medical peer review committee," none of the submitted information may be withheld under section 552.101 in conjunction with section 160.007 of the Occupations Code.

Parkway Place also attempts to raise sections 552.108 and 552.111 of the Government Code. Section 552.108 excepts from disclosure certain law enforcement information. See Gov't Code § 552.108. Section 552.111 excepts from disclosure certain interagency or intra-agency memoranda. See *id.* § 552.111. These are both discretionary exceptions designed to protect the interests of governmental bodies, not of third parties. See Open Records Decision Nos. 177 (1977) (statutory predecessor to section 552.108), 473 (1987) (statutory predecessor to section 552.111). The governmental body may choose to waive these exceptions and release the information. *Id.* Due to the nature of discretionary exceptions, only a governmental body may raise them. Since the department has chosen not to raise these exceptions, none of the information may be withheld under section 552.108 or 552.111.

Finally, we note that the “normally release” information contains materials that may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the department is not a “medical peer review committee,” and none of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with section 151.002 of the Occupations Code. The department must withhold the “not release” information. The “normally release” information contains medical record information, which may be released only in accordance with the MPA. We have marked bank account numbers, which must be withheld. The personally identifying information in the HCFA 2567 forms must be redacted. The information you have highlighted as being personally identifying and that which we have marked must be redacted. We have marked information that you highlighted that we do not find to be personally identifying and that you must release. Social security numbers may be withheld only if obtained or maintained pursuant to a law enacted on or after October 1, 1990. You must release all remaining information. However, in so doing, you must comply with copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental

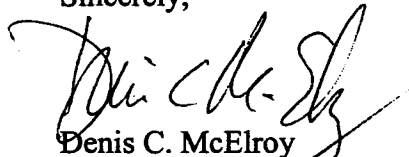
body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 161503

Enc. Marked documents

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